# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court (Pet. App. A) is unreported. The opinion of the court of appeals (Pet. App. B) is reported at 349 F. 2d 601.

### JURISDICTION

The judgment of the court of appeals was entered on August 26, 1965. A petition for rehearing was denied on November 9, 1965. On December 3, 1965, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 8, 1966, and the petition was filed on December 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



206-483—66

## QUESTIONS PRESENTED

1. Whether Section 5855 of the Internal Revenue Code prohibiting the interstate shipment of unregistered firearms is constitutional.

2. Whether the evidence was sufficient to sustain the conviction.

## STATUTE INVOLVED

National Firearms Act, 26 U.S.C.:

§ 5841 Registration of Persons in General

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

§ 5855 Unlawful Transporation in Interstate Commerce

It shall be unlawful for any person who is required to register as provided in Section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of Ohio, petitioner was convicted of interstate transportation of unregistered firearms in violation of 26 U.S.C. 5855 and was fined $2,000 and placed on probation for three years (D.A. 62a).[1] Petitioner's pre-trial motions to dismiss the indictment on the ground that prosecution under Section 5855 was unconstitutional (D.A. 2a) were dismissed by the district court (D.A. 3a–5a, 8a–9a; Pet. App. 1a–3a). On appeal, the conviction was affirmed (Pet. App. 4a–8a).

The evidence showed that petitioner, a licensed dealer in firearms, purchased a stock of weapons from another licensed dealer in Wisconsin and arranged for its shipment to New Jersey, approximately two weeks later, by truck (G.A. 5b–6b, 32b). The truck carrying petitioner's firearms was stopped by Ohio police for being overweight (G.A. 11b–13b). After the driver was unable to produce a bill of lading, the cargo was inspected, and a list of all the weapons was sent to the Treasury Department for a registration check (D.A. 58a–61a; G.A. 14b–18b; Ex. 2–B). The check revealed that 53 of the firearms were not registered pursuant to any provision of the National Firearms Act (D.A. 51a–55a; Ex. 2–A, G.A. 25b–26b).

[1] "D.A." refers to the appendix to the Brief for Defendant-Appellant and "G.A." to the appendix to the government's brief filed in the court below.

## ARGUMENT

The sole basis for petitioner's contention (Pet. 7–15) that his prosecution for *unlawful interstate transportation* of firearms under 26 U.S.C. 5855 was unconstitutional is the fact that prosecutions for *failure to register* under 26 U.S.C. 5841 have been held to violate the privilege against self-incrimination. *Russell* v. *United States*, 306 F. 2d 402 (C.A. 9); *Dugan* v. *United States*, 341 F. 2d 85 (C.A. 7). Assuming, *arguendo*, that these decisions are correct,[2] the court below properly held that they do not support petitioner's contention. There is no conflict among the circuits on this issue. Indeed, the decision below is in accord with those of all the circuits—including the Ninth—which have passed on basically the same contention as petitioner's in the analogous case of prosecutions under 26 U.S.C. 5851. There is, therefore, no occasion for further review.

The *Russell* and *Dugan* cases were limited to the direct enforcement of criminal sanctions for failure to register under Section 5841. Reading that section as requiring persons "to provide information as to past conduct (or present status) which was actually

[2] *Russell* and *Dugan* were both predicated on the erroneous assumption that registration under Section 5841 *necessarily* constitutes admission of illegal possession under Section 5851 (306 F. 2d at 408, 411; 341 F. 2d at 86), although the Seventh Circuit appeared at one point to recognize that there were cases in which registration under Section 5841 would not be self-incriminatory (see 341 F. 2d at 87). See *United States* v. *Sullivan*, 274 U.S. 259. In any event, the question of direct prosecutions under Section 5841—involved in *Russell* and *Dugan*—is of no continuing importance, since such prosecutions are no longer being brought by the government.

or presumptively unlawful" (306 F. 2d at 410), the courts held that a person could not constitutionally be prosecuted for failing to provide such information. Subsequent to *Russell*, the Ninth Circuit held that its decision in that case did not preclude convictions under 26 U.S.C. 5851 for *unlawful possession* of unregistered firearms since, in such a case, the defendant is not prosecuted for his failure to provide information. *Frye* v. *United States*, 315 F. 2d 491, 494, certiorari denied, 375 U.S. 849; *Starks* v. *United States*, 316 F. 2d 45, 46.[3] See to the same effect *Taylor* v. *United States*, 333 F. 2d 721, 722 (C.A. 10); *Sipes* v. *United States*, 321 F. 2d 174, 178 (C.A. 8), certiorari denied, 375 U.S. 913. *Castellano* v. *United States*, 350 F. 2d 852 (C.A. 10), petition for a writ of certiorari pending, No. 863 Misc., this term. The rationale of these cases is that, although the government cannot punish a person for failure to incriminate himself under Section 5841, it may prohibit a person from receiving or possessing a gun for which he does not have proper documentation. In effect, the statute has been interpreted to hold the possessor of a gun to a requirement that its title be on record with the Treasury Department. In such a prosecution, the government must affirmatively show both possession of the gun and lack of proper documentation.

[3] Contrary to petitioner (Pet. 12-13), *Frye* and *Starks* are not distinguishable from the present case on the ground that Section 5851, but not Section 5855, might involve only the failure to register under Section 5841 by someone other than the defendant. No such line was drawn in either of these cases. In fact, every person possessing a firearm is required to register under Section 5841 unless he or someone else who was re-

As the court below held, the same rationale applies to this case. The gist of the offense is shipping unregistered guns in interstate commerce. Petitioner was not, and could not be, prosecuted under Section 5855 for failure to register or for refusing to incriminate himself. The statute did not force him into either accepting or transporting firearms. He could have refused to purchase them, registered the transaction himself at the time of purchase without risk of self-incrimination,[4] or refrained from shipping them interstate. Petitioner, a substantial dealer in firearms (Pet. 20, n. 13) undoubtedly familiar with the federal documentation requirements, made the threshhold decision to ship unregistered arms in interstate commerce, and it was for this conduct alone that he was prosecuted.

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quired to register the gun under some other provisions of the Act has already done so. Thus, the defendants in *Frye* and *Starks*, no less than petitioner, were covered by the registration provision of Section 5841.

[4] The tax imposed by Section 5811 on the transfer of firearms is payable by the transferor and is evidenced by stamps affixed to an order form. Transactions between licensed dealers, as were involved here, are not taxed under Section 5811, however, and no order form, but merely recordation of the transaction, is required. 26 U.S.C. 5814(c), 26 C.F.R. 179.151. The information which petitioner was required to record with the Treasury Department at the time he received the firearms in question is essentially the same as that required of persons falling within the registration provision of Section 5841. Thus, petitioner's filing of the required data, if done at the time of transfer and before he shipped the arms interstate, would not have constituted an admission of any illegal conduct on his part, but rather would have validated, under the Act, his acquisition and subsequent interstate shipment of the firearms. Cf. *Mares v. United States*, 319 F. 2d 71, 73 (C.A. 10).

2. The argument that the government failed to prove that petitioner was required to register before he shipped the guns interstate (Pet. 21–23) is without merit. Under Section 5841 any transferee of a firearm, as defined in the Act,[5] is required to register unless the firearm had already been registered and the transfer properly reported in accordance with other provisions of the Act (see n. 4, *supra*). Hence, the certificate introduced by the government that the firearms in question had never been registered under *any* section of the Act necessarily proved that petitioner was required to register the guns before he shipped them interstate.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] The contention (which petitioner reserves but does not argue) that the guns in question do not fall within the definition of "firearm" in Section 5848 is without merit. Presumably this argument will be based on the fact that some of the guns were not operative without the addition of a part. Aside from the fact that we do not believe this removes the guns from the purview of the Act, there was testimony that a number of the weapons were actually in full operative condition at the time of shipment (G.A. 26b–30b).

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